IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Criminal Writ Petition No.1572 of 2007

Mrs.Sukana Hurmat Merchant & anr. Petitioners
Vs.
Hurmat Ali Merchant & anr. Respondents

Mr.L.S.Gaikwad for petitioners.
Mr.Ratheshwar Jha for resp.no.1.
D.P.Adsule, APP for State.

CORAM: B.H.MARLAPALLE, J.

November 1, 2007.

ORAL ORDER:

1. Heard. Rule. Respondents waive service.

2. The petition is taken up for final hearing forthwith. The petitioner and respondent no.1 were married on 2/1/2002 and from the said wedlock they begot a son - Raheel on 27/9/2005. It is the petitioner's case that while she was pregnant of about 11 weeks she was taken to Meera Agarwal Hospital at Bandra on 19/1/2004 and was forced to undergo an abortion. In the month of November 2004 when she conceived second time, she alleges that her husband started giving her threats and wanted her to undergo the second abortion. When she refused, the consequences were that she was driven out of the

house on 15th March 2005 and the complaint came to be lodged against her by the respondent no.1 with Manickpur Police Station at Vasai on 6/6/2005. The respondent no.1 also filed Civil Suit No.656 of 2006 before the City Civil Court at Mumbai and took out Notice of Motion No.3232 of 2006 praying for restraining orders against the petitioner from entering into the matrimonial home. The Notice of Motion was dismissed on 24/2/2006. In the mean while the petitioner had approached the Court of the learned Judicial Magistrate First Class at Vasai by filing Criminal Misc. Application No.406 of 2005 for maintenance under Section 125 of Cr.P.C. and this application was opposed by the respondent no.1 - husband on the ground that he had already given oral Talaq and sent Talaqnama to the petitioner. The learned Judicial Magistrate First Class was not satisfied with the defence taken and the maintenance application came to be allowed as per the judgment and order dated 30/8/2006. The husband has been directed to pay maintenance of Rs.2500/- per month to both the claimants i.e. the petitioner wife and the minor son.

3. Being aggrieved by the said order passed by

the learned Judicial Magistrate, First Class, the husband approached the Sessions Court at Palghar in Criminal Revision Application No.61 of 2006 and the said application has been allowed by the learned 1st Ad-hoc Addl. Sessions Judge at Palghar holding that, (a) the wife was aware that she was divorced by her husband when she filed the application under Section 125 of Cr.P.C. before the learned Judicial Magistrate, First Class at Vasai, (b) as per the Mohammedan Law the Talaq may be oral or in writing and no evidence is required to prove Talaq as the divorce by the husband is complete just by utterance of words "Talaq, Talaq, Talaq" thrice and the presence of a third person is not necessary and (c) the trial Court lost sight of the fact that in Muslim Talaq may be effected orally or by a written document and no formal proof of it is necessary. In support of its reasoning the learned Addl. Sessions Judge has referred to the judgments in the case of Pyaranbi Usuf Naik vs. Usuf Abbas Naik **[2001 All M.R. (Cri) 1786]** and Chandbi Ex wife of Badesha Mujawar V. Badesha Balwant Mujawar **[AIR 1961 BOMBAY 121]**.

. The learned counsel for the respondent - husband in support of the impugned order has also

relied upon the following decisions of this Court in addition,

(a) Banobee w/o Babbu Garve Vs. Babbu s/o. Hiru Garve **[2004 All MR (Cri) 673]**

(b) Wajed Khan Maheboob Khan vs. Mohasinabi Mustafa Khan **[2002 All MR (Cri) 1978]**.

. Both these decisions as well as the decision in the case of Pyaranbi Usuf Naik (Supra) lay down that a divorced Muslim woman is not entitled to claim maintenance under Section 125 of Cr.P.C. and her remedy lies under the Muslim Women's Protection of Rights on Divorce Act, 1986. None of the these judgments deal with the issue regarding a valid Talaq under the Muslim law. The same issue has been considered by a Full Bench of this Court in the case of Dagdu Chotu Pathan vs. Rahimbi Dagdu Pathan and ors. **[2003 (1) Bom.C.R. 740]**. The learned counsel for the petitioners has also relied upon a subsequent decision of the Supreme Court in the case of Iqbal Bano Vs. State of U.P. and anr. **[(2007) 6 SCC 785]**. In the case of Dagdu Pathan (Supra) the Full Bench observed in para 26 as under:

"The above discussion does indicate that mere pronouncement of Talaq by the husband or merely declaring his intentions or his acts of having pronounced the Talaq is not sufficient and does not meet the requirements of law. In every such exercise of right to Talaq the husband is required to satisfy the preconditions of arbitration for reconciliation and reasons for Talaq. Conveying his intentions to divorce the wife are not adequate to meet the requirements of Talaq in the eyes of law. All the stages of conveying the reasons for divorce, appointment of arbiters, the arbiters resorting to conciliation proceedings so as to bring reconciliation between the parties and the failure of such proceedings or a situation where it was impossible for the marriage to continue, are required to be proved as conditions precedent for the husband’s right to give Talaq to his wife. It is, thus, not merely the factum of Talaq but the conditions preceding to this stage of giving Talaq are also required to be proved when the wife

disputes the factum of Talaq or the effectiveness of Talaq or the legality of Talaq before a Court of law. Mere statement made in writing before the Court, in any form, or in oral depositions regarding the Talaq having been pronounced sometimes in the past is not sufficient to hold that the husband has divorced his wife and such a divorce is in keeping with the dictates of Islam..."

4. Thus the view taken by the learned Addl. Sessions Judge is contrary to the law laid down by the Full Bench of this Court in Dagdu Pathan's case (Supra). The learned Addl. Sessions Judge committed a manifest error in accepting the husband's plea that he had already divorced the claimant no.1 by Talaqnama on 28/4/2005 and the demand draft and Advocate's letter informing her that he had divorced her on 27/4/2005. Consequently the impugned order cannot be sustained and the same deserves to be quashed and set aside.

5. Hence the petition is allowed and the impugned order passed by the learned 1st Ad-hoc Addl. Sessions Judge at Palghar is hereby quashed and set

aside and the order passed by the learned Judicial Magistrate, First Class, Vasai in Criminal Misc. Application No.406 of 2005 is hereby confirmed. Rule is made absolute accordingly.

(B.H.MARL